



EXPLORING 'PRACTICAL' CONCEPTIONS OF THE ROLE OF THE CRIMINAL DEFENCE LAWYER: A METHODOLOGICAL OVERVIEW

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Abstract

This article examines the methodology behind an empirical study investigating the 'real life' role of criminal defence lawyers and their approach to ethical conflict resolution. Using a normative conceptual framework entitled the 'zealous advocate' model, the study involved interviews with defence practitioners. A central feature of the interviews was a method known as the 'vignette technique', which used hypothetical scenarios to simulate realistic 'conflict' situations for respondents to consider. This article summarises the theory behind the study, examines the methodological issues of empirical research with lawyers, examines the benefits and limitations of the 'vignette technique', and details the construction of the 'Professional Conduct Scenarios' which were used in the study.

Keywords: criminal defence lawyers, ethical conflict, zealous advocate model, research into legal profession

Introduction

In 2009, the author undertook an empirical study with the aim of exploring the reality of the practising criminal defence lawyer's role, and their approach to resolving ethical conflicts. The fieldwork was designed to complement a theoretical exploration of the defence lawyer's role, based on a normative framework entitled the 'zealous advocate' model. As such, the empirical element of the research aimed to ensure that the theoretical analysis did not exist in a vacuum; the true test of the validity and relevance of the 'zealous advocate' would be whether modern practitioners recognised it as an accurate reflection of their working life. The legitimacy of any

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empirical study hinges on the methodology adopted; this article explores this in depth, critiquing the choices made by the author in preparing for, designing and undertaking the fieldwork.

The aforementioned 'zealous advocate' model outlines a normative conception of the traditional adversarial criminal defence role. The model is not the subject of this article, but it is necessary to provide a brief summary as it directly informs the study. The model consists of three duties, oriented towards a different 'master' of the criminal defence lawyer – namely the client, the court and the public. Each is underpinned by principles of behaviour, six in total. These are the principles of partisanship, detachment and confidentiality (under the duty to the client), the principles of procedural justice and truth-seeking (under the duty to the court), and the principle of fairness (under the duty to the public). Below are brief summaries of each principle:

- Partisanship obligates the defence lawyer to zealously protect the defendant's interests above all others;
- Detachment requires that the defence lawyer refrain from judging the character or cause of a client and accept any client that requires assistance;
- Confidentiality obligates the defence lawyer to protect information and communications relating to the client's case;
- Procedural Justice requires the defence lawyer to aid in the administration of justice by ensuring proceedings are conducted in an efficient and appropriate manner;
- Truth-seeking obligates the defence lawyer to help in the search for the truth by being honest, open and accurate;
- Fairness (a loose and less robust obligation) expects the defence lawyer to behave ethically in dealing with others involved in a case and upholding ordinary standards of morality and decency.

As stated above, the study was directed at assessing whether the 'zealous advocate' model is reflected in the defence lawyer's everyday role – what might be termed the 'practical' (as opposed to theoretical) role. The study also sought to uncover how defence lawyers cope with ethical conflicts. The principles of the model naturally conflict with each other; confidentiality obstructs truth-seeking, partisanship can disrupt procedural justice, and fairness can be thwarted by detachment. As such, in theory, managing the different obligations of the role presents issues for defence lawyers. The study aimed to explore whether such ethical dilemmas exist in practice and if so, how defence lawyers resolved them. For example, in a clash between obligations to the defendant and the court, which would prevail? In order to do this, the study utilised a series of hypothetical vignettes, entitled 'Professional Conduct

Scenarios'. These were designed to effectively investigate the practical role of the defence lawyer in response to a series of methodological issues. These issues, the vignettes, and their creation will be examined in this article.

1 The Empirical Study: An Overview

The study adopted a qualitative approach, in that it was focused on uncovering 'the underlying motivations that people have for doing what they do',² and exploring their 'ideas, attitudes, motives and intentions'.³ To achieve this, the author undertook a series of in-depth interviews with criminal defence practitioners; that is, qualified professionals engaged in providing advice or representation to clients suspected of or charged with criminal offences. Qualitative interviews were chosen simply because they would provide the freedom to explore what constitute the core obligations which might define the role of the criminal defence lawyer in a flexible and unrestricted manner. The open-ended nature of the interviews allowed respondents to independently express their views on their role without being led to conclusions, but at the same time ensured that the author could restrict the dialogue to relevant issues. Each interview was conducted using a standard *pro forma* specifically designed for the purpose and which was divided into three sections.

The first section posed a series of set questions with the aim of extracting 'base-line' information from respondents. These were basic facts about their firm or chambers, their experience, and the specific types of defence work (for example, bail applications in court, police station representation, etc.) which they usually undertook. This was necessary not only to establish reference points for the analysis of data, but also to demonstrate that a variety of lawyers, with a variety of experience, from a variety of organisations were interviewed. This diversity provides a more accurate picture of how defence lawyers view their role; interviewing several solicitors from the same firm would provide less useful data than interviewing a mix of solicitors and barristers from a selection of firms and chambers. In essence, a wider sample of subjects would hopefully yield more valid results.

The first section also directly asked respondents to describe, in their own words, their obligations to different parties, including the client, the court and the prosecution. This kind of direct questioning ensured that, should the rest of the interview fail to

² Henn M., Weinstein M., Foard N., *A Short Introduction to Social Research* (2006, SAGE), p.149.

³ *Ibid.*, p.150.

elicit any clear opinions on their role, some basic impressions about their views could be gleaned. More importantly, directly asking respondents about their obligations presented an opportunity to explore, without any context or facts, what they broadly believed their obligations to be; this provided an insight into how they consciously constructed their role when detached from the reality of their work. This type of enquiry, as will be discussed later, does not necessarily reveal how respondents' would behave in practice. However, for the purpose of this study, it did enable 'a comparison between an interviewee's views and beliefs as expressed in general terms and their application to more or less detailed scenarios', and therefore revealed potential inconsistencies between what respondents preached and what they 'practiced'.⁴ What they practiced was explored in the second section of the *pro forma*. This section utilised a set of hypothetical vignettes – referred to as 'Professional Conduct Scenarios' for the purposes of this study – to ascertain how respondents' obligations operated in practical situations and whether these obligations reflected the 'zealous advocate' model. This will be discussed in more detail below.

The third section also posed set questions, focusing on the sources of guidance defence lawyers referred to when resolving ethical conflicts, their opinions on the influential Criminal Procedure Rules (CPR), how respondents characterised the role of the defence lawyer, and how that role had changed in recent years. Covering these subjects separately was important; exploring their attitude toward sources of guidance gave an impression of how useful respondents found modern regulation defining their role and would perhaps indicate a need for revision. The CPR have introduced a 'culture change' in criminal case management and, consequently, the role of the criminal defence lawyer.⁵ It was therefore appropriate to dedicate a few questions solely to the exploration of their impact. Asking respondents about how they would describe the role of the criminal defence lawyer in broad terms would, hopefully, encourage them to focus on the most crucial aspects of their work and their most prominent obligations. The question was asked without prior warning in order to encourage an instinctive, on-the-spot response.

⁴ Field S., 'Early Intervention and the "New" Youth Justice: A Study of Initial Decision-Making' (2008) *Criminal Law Review*, p.180.

⁵ See the comments of Hughes LJ in *R v Rochford* [2010] EWCA Crim 1928.

2 The Methodological Challenges of Researching Lawyers

As a subject of research, lawyers present several problematic traits which can hinder effective enquiry. The choice of methodology for this empirical study was driven by a desire to overcome such obstacles and probe deeper into the day-to-day role of the criminal defence lawyer; it therefore seems appropriate to discuss some of the potential methodological issues in lawyer-based research. Selecting tried and tested methods for empirical work with legal practitioners is difficult because of a lack of established methodology in the area, partly because of the novelty of practitioner-oriented empirical research:

The history of research into the English Criminal Justice System is very short... only in the last twenty years have social scientists singled out the activities of Police Officers, Judges, Lawyers and other court personnel as subjects worthy of attention.⁶

The above statement was made in 1981 and much research has of course been undertaken since. Yet, over a decade later in the mid-1990s, the same author claimed that ‘there has been no systematic attempt to describe and explain what lawyers actually do’⁷ – particularly the ‘working practices and philosophies of duty solicitors [and] defending solicitors... engaged in criminal work’.⁸

Studies of the law and legal practices ‘did not make lawyers the focus of their interest and were very much “end-process” oriented in their concern with court-based activity.’⁹ This lack of focus on solicitors, barristers and other qualified legal professionals created a significant ‘lacuna’ in both the collective knowledge about their work and the methodological rigour of such research.¹⁰ In the last 15 years, empirical research into the activities of lawyers, from both a legal perspective,¹¹ and wider sociological perspective,¹² has attempted to fill this gap. However, using what one can broadly term quantitative and qualitative interviews and general observation are as far as proven fieldwork methods go, with expansion on those concepts open to the individual researcher. It therefore seems that the development of effective methodology for researching lawyers, and most particularly defence lawyers, is still

⁶ Baldwin J., McConville M., *Courts, Prosecution and Conviction* (1981, Clarendon Press), p.19.

⁷ McConville M., et al., *Standing Accused: The Organisation and Practices of Criminal Defence Lawyers in Britain* (1994, Clarendon Press), p.1.

⁸ *Ibid.*, p.9.

⁹ *Ibid.*

¹⁰ Tague P., ‘Barristers’ selfish incentives in counselling defendants over the choice of plea’ (2007) *Criminal Law Review*, p.4.

¹¹ *Ibid.*

¹² Harris L., ‘The Emotional Labour of Barristers: An exploration of emotional labour by status professionals’ (2002) 39 (4) *Journal of Management Studies*, pp.553-584.

dogged by a lack of academic interest.

A second potential limitation on effective empirical research with lawyers is distrust of outside research, an attitude that inevitably inhibits a researcher's ability to access the world of the research subject. At an early stage of research with lawyers, academics concluded that '[t]he legal profession has never shown much enthusiasm for research',¹³ and that researchers were generally regarded 'with suspicion and on occasions with fear'.¹⁴ This is not isolated to lawyers, but, as an ancient, unique and elite profession, it has been observed many times that legal practitioners demonstrate the 'understandable reluctance of any professional group to allow its activities to be scrutinised with no obvious benefits for its members'.¹⁵ This 'natural conservatism shown by any profession towards having its business examined by outsiders',¹⁶ was illustrated *in extremis* in the historical, but educational, example of the furore surrounding the publication of *Negotiated Justice*.¹⁷ This study implicated legal practitioners, particularly barristers, in 'plea bargaining' – the informal agreement between prosecution and defence that the defendant will plead guilty to lesser charges. This highlighted the possibility that counsel had exerted inappropriate pressure on defendants to plead guilty to offences when they did not want to.

The research had been conducted with defendants only, as the Senate of the Bar, the representative body of barristers, had 'withheld co-operation'.¹⁸ There were 'continued efforts to thwart the conduct of the research',¹⁹ and a 'concerted attempt... to prevent publication'.²⁰ The findings resulted in 'open hostility' toward the authors,²¹ with leaders of the legal profession 'resort[ing] to slur and innuendo when pressed'.²² The authors of *Negotiated Justice* drew the following conclusion:

Lawyers characteristically demonstrate an extraordinary high level of satisfaction with current procedures and attempts to change these, from outside or from within, are likely to encounter the most stubborn resistance. No researcher, then, who trespasses on this difficult terrain, can expect an

¹³ Baldwin J., McConville M., 'Plea Bargaining: Legal Carve-Up and Legal Cover-Up' (1978) 5 (2) *British Journal of Law and Society*, p.228.

¹⁴ Baldwin, *Courts, Prosecution and Conviction* (1981), p.1.

¹⁵ McConville, *Standing Accused* (1994), p.13.

¹⁶ Baldwin, *Plea Bargaining* (1978), p.228.

¹⁷ Baldwin J., McConville M., *Negotiated Justice* (1977, Martin Robertson).

¹⁸ McConville M., Wing Hong Chui, *Research Methods for Law* (2007, Edinburgh University Press), p.209.

¹⁹ Baldwin, *Plea Bargaining* (1978), 235.

²⁰ McConville, *Research Methods for Law* (2007), p.211.

²¹ *Ibid.*

²² Baldwin, *Plea Bargaining* (1978), 235.

easy passage.²³

In the light of this warning, the implications for empirical research methodology were clear. Any approach would need to penetrate a potential layer of distrust and allow the respondents to interpret questions in their own way. It should be made clear at this point that, in undertaking this empirical study, the author encountered virtually no resistance or evasion; all of the respondents were very open, friendly and willing to participate. One would hope that this was, in part, a result of the methodology that was adopted.

Another potential issue is the attachment of lawyers to the standard values of their profession and their adherence to the 'official line'. The 'official line' is the *right* one, the 'correct answer' to a question and one which may not reflect the truth. However, providing acceptable answers to a researcher is not necessarily a deliberate or conscious deception on the part of lawyers; it is a result of training and a natural, internal perspective. The education and regulation of legal practitioners aims to breed proud and conservative professionals with an in-built loyalty to and respect for the standards that govern them. For example, Rule 301 of the Bar Code of Conduct states that a barrister 'must not... engage in conduct... which is... likely to diminish public confidence in the legal profession' and 'must not... engage directly or indirectly in any occupation if his association with that occupation may adversely affect the reputation of the Bar.' It has also been observed in the past that the 'the [legal] profession itself tends to promote an altruistic model under which solicitors use their skills in the interests of their clients and of the public.'²⁴ The importance of maintaining this reputation is indoctrinated through a lengthy and intensive training process, which 'provides the initiate with a knowledge (tacit or explicit) of the norms and values of the occupational community',²⁵ resulting in a 'high degree of social and cultural homogeneity at the point of entry'.²⁶ Beyond their education, lawyers practice in fairly closed circles, interacting largely with each other, meaning that 'the initiate's subsequent path through the legal profession becomes a highly structured 'rite de passage'.²⁷ Therefore, a lawyer asked about their role may understandably tend toward the 'official' answer.

²³ Ibid., p.228.

²⁴ McConville, *Standing Accused* (1994), p.11.

²⁵ Ibid., p.12.

²⁶ Ibid.

²⁷ Ibid.

This could be in the form of 'presentational information' being offered by respondents;²⁸ that is, an answer that presents an acceptable image and upholds the integrity of the profession. Alternatively, the 'official line' may be a result of 'respondents' imperfect knowledge of their own world';²⁹ in essence, a lack of awareness that the 'official' answer and the reality may be different. The author experienced this first-hand, prior to commencing the fieldwork proper. Whilst undertaking a day of observation in the Crown Court of a large, urban legal circuit,³⁰ the author discussed the role of the criminal defence lawyer with a barrister. When asked if he was a 'zealous advocate', he responded that he believed he was, and talked about defending the best interests of the client. However, the author later observed him spend time convincing a client, who claimed to be innocent of any offence, that she should plead guilty. After arranging a plea bargain with a very forceful and impatient prosecuting barrister, the client agreed and the case 'cracked'.³¹ It thus seemed reasonable to question whether the 'official line' and the reality matched up in this situation; arguably, the client and lawyer had divergent views as to what the client's best interests were. In this case, does a lawyer serve the best interests of the client by doing his or her best to execute the client's wishes, or by effectively 'overruling' the client and imposing their own paternal view, however well intended it might be?

Two further issues had the potential to restrict effective empirical research with lawyers. Lawyers, and particularly criminal defence lawyers, act as a confidante and 'legal friend... which exemplifies... the ideal of personal relations of trust'.³² Without that reputation of discretion and trustworthiness, the lawyer cannot perform his or her work. Empirical research is, by its nature, intrusive; to effectively explore the role and work of a lawyer, a researcher will seek to at least glimpse the private domain of the practitioner and his or her clients. As a result, lawyers may be unwilling to engage in fieldwork of this nature for fear of undermining their standing as a figure of trust, and also to protect client confidentiality, an obligation which 'predisposes lawyers to be extremely reluctant to allow a research function to intervene at all'.³³ The

²⁸ *Ibid.*, p.13.

²⁹ *Ibid.*

³⁰ This was a different legal circuit to the one used for the empirical study.

³¹ A 'cracked' case is any case where, on the day of a listed trial, the defendant changes his plea to guilty, pleads to a lesser charge or the prosecution decides not to proceed. See s.1(1), Schedule 1 of the *Criminal Defence Service (Funding) Order 2007 No. 1174*.

³² Fried C., 'The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation' (1975-1976) 85 *Yale Law Journal*, p.1075.

³³ Danet B., Hoffman K., Kermish N., 'Obstacles to the study of Lawyer-Client interaction: The

methodology would therefore need to make appropriate provision for anonymity guarantees, in order to reassure respondents that their reputation would not be jeopardised.

The second problem applied specifically to criminal defence lawyers – that of public image. Lawyers generally are the subject of a ‘widespread and ancient perception that [they] are grasping, callous, self-serving, devious and indifferent to justice, truth and the public good.’³⁴ As a result of this, criminal defence lawyers, as one of the most visible and well-known types of lawyer, have a particularly poor public image.³⁵ They are often regarded as defenders of the wicked and persecutors of the victimized. Furthermore, because ‘there is a tendency to associate lawyers with their clients... for criminal lawyers the association with poverty and crime gives them low status within the professional hierarchy.’³⁶ One therefore expects to encounter a profession suffering from low morale, unwilling to be exposed to further analysis, criticism and potential denigration from an outsider. The methodology would therefore need to grant respondents the opportunity to explain their role in their terms and avoid any loaded concepts or implied criticism. I felt that a methodological approach generally referred to as the ‘vignette technique’ could effectively counter all of the above issues.³⁷

3 The ‘Vignette’ Technique

3.1 What are ‘vignettes’?

The vignette technique uses ‘short stories about hypothetical characters in specified circumstances, to whose situation the interviewee is invited to respond.’³⁸

biography of a failure’ (1979-1980) 14 (4) *Law & Society Review*, p.910.

³⁴ Dare T., *The Counsel of Rogues? A defence of the standard conception of the lawyer's role* (2009, Ashgate), p.1.

³⁵ This reputation goes beyond the public at large. In the case of *R v (on the application of Faisaltext Ltd) Preston Crown Court* [2008] EWHC 2832, police searched the offices of a firm of criminal defence solicitors for files relating to the potential criminal activities of their clients. The solicitors were not given an opportunity to ‘produce’ the files because the police and lower Court concluded that they might allow their clients to remove and destroy them before a search could be carried out. Lord Justice Keene was forced to state that, ‘A solicitor is not to be regarded as somehow tainted and unreliable because, for example, he acts for someone charged with or convicted of a criminal offence’ – an assumption the police and lower Courts appeared to have made.

³⁶ McConville, *Standing Accused* (1994), 24.

³⁷ For more on the issues encountered by researchers working with lawyers and the use of vignettes with lawyers, see Jack R., Jack D., *Moral vision and professional decisions: the changing values of women and men lawyers* (1989, Cambridge University Press).

³⁸ Finch J., ‘The Vignette Technique in Survey Research’ (1987) 21 (1) *Sociology*, p.105.

Respondents are 'typically asked to respond to these stories with what they would do in a particular situation or how they think a third person would respond.'³⁹ The purpose of this was to obtain an impression of how a respondent behaves in a realistic context and why. The 'scenarios depicted in the stories can take the form of "moral dilemmas"', and by asking the respondent to make choices about what action they would take in the situation presented, one can hopefully derive what values, principles or beliefs drive that behaviour.⁴⁰ In this study, the application of the vignette technique was therefore designed to present ethical dilemmas to criminal defence lawyers to which they would respond, outlining what course of action they would take in such circumstances. The decisions made by the respondents should, in theory, reflect what criminal defence lawyers regard as their guiding values and obligations as professionals. The 'Professional Conduct Scenarios' mentioned above were types of vignette; the alternative label was chosen to more appropriately reflect the focus of the vignettes and also to avoid using a term that, whilst having a specific meaning to empirical researchers, might have confused respondents as to the nature and purpose of the scenarios.

3.2 Advantages and Disadvantages of the Vignette Technique

This choice of method was based on extensive research into past use and academic commentary on the advantages and disadvantages of vignettes. One of the key advantages of the vignette technique is its focus on specific, hypothetical situations. A fundamental criticism of interview or survey-based research is 'the ambiguity that often arises when survey respondents are asked to make decisions and judgments from rather abstract and limited information.'⁴¹ This is a problem for two reasons. First, it can result in responses which are 'simply bland generalisations and impossible to interpret'.⁴² Presenting a respondent with vague, abstract questions is likely to encourage answers that are detached from their day-to-day experience. Second, a respondent may not be 'particularly insightful about the factors that enter their own judgment-making process' and forcing them to engage in isolated speculation about such factors may lead to confusion and inaccuracy.⁴³ Thus, asking direct questions about abstract concepts that seemingly bear no relation to the 'real-life' experience of a respondent may prove difficult for him or her to answer.

³⁹ Hughes R., 'Considering the vignette technique and its application to a study of drug injecting and HIV risk and safer behaviour' (1998) 20 (3) *Sociology of Health & Illness*, p.381.

⁴⁰ Ibid.

⁴¹ Alexander C., Becker H., 'The Use of Vignettes in Survey Research' (1978) 42 (1) *The Public Opinion Quarterly*, p.103.

⁴² Finch, 'The Vignette Technique' (1987), p.110.

⁴³ Alexander, 'The Use of Vignettes' (1978), p.95.

In contrast, the vignette technique avoids asking a respondent directly about factors that they may not comprehend in the same way as the interviewer. Instead, they enable an interviewer to place a respondent in a position where he or she can make instinctive decisions about specific factors which are indicative of the underlying principles that shape their role. By asking a respondent to focus on a specific set of facts, they 'move further away... from a direct and abstracted approach, and allow for features of the context to be specified, so that the respondent is being invited to make normative statements about a set of social circumstances, rather than to express his or her "beliefs" or "values" in a vacuum.'⁴⁴ The use of vignettes recognises that a respondent has to make decisions about his or her behaviour in a variety of circumstances and 'acknowledges that meanings are social and that morality may well be situationally specifically.'⁴⁵ Therefore, asking a respondent to react to a set of facts rather than a direct, abstract question 'more closely approximate[s] a real-life decision-making or judgment-making situation.'⁴⁶ The more realistic and specific the situation in which a respondent is placed, the more likely one is to receive a realistic and specific response, which more accurately indicates how defence lawyers resolve conflicts in 'real life'.

Vignettes should also result in more honest and natural answers. Vignettes disguise the intentions of the interviewer, making it less likely that a respondent will be influenced by leading questions or directed reasoning. Vignettes generally contain an ethical dilemma which a respondent is asked to resolve; resolution indicates what principles guide their behaviour. The ethical dilemmas presented in the vignettes reflect the conflicts inherent in the 'zealous advocate' model. Directly presenting such conflicts to a respondent has little empirical value because it effectively guides the respondent to the answer. Consider the following question:

When faced with a conflict between the two obligations, would you say that your duty to assist the court takes precedence over your duty to fearlessly defend your client?

The question may influence the respondent in three ways. First, the use of language such as 'fearlessly defend' and 'assist the court' presumes that these are, by default, a defence lawyer's practical obligations. Second, presenting them in this way

⁴⁴ Finch, 'The Vignette Technique' (1987), p.106.

⁴⁵ Ibid.

⁴⁶ Alexander, 'The Use of Vignettes' (1978), p.93.

presumes that the respondent subscribes to this view, without providing any opportunity for him or her to identify them without being prompted. Third, presenting a conflict directly and asking about how it might be resolved inherently hints that the interviewer is looking for a particular answer.

When faced with this type of loaded question, the likelihood is that a respondent will provide the answer they think the questioner wants to hear – known to psychologists as the observer-expectancy effect. This is likely to be the 'official' answer; formal regulation of the lawyer's role (such as professional codes of conduct) provide 'official' answers to questions such as these. The Bar Code of Conduct deals with the above conflict quite explicitly, stating that the duty to the court is 'overriding'.⁴⁷ This, of course, may not necessarily reflect the reality of conflict resolution. In addition, no detail about the 'conflict' is given; to quote or paraphrase the formal guidance is much easier than considering the potential permutations of a real life client-court conflict. These kinds of answers defeat the point of the fieldwork; its purpose is to investigate whether day-to-day criminal defence work reflects the normative conception of the role embodied by the 'zealous advocate' model. If posing questions like the one above only results in broad, formal answers, then they have no place in a probing and effective empirical study. Vignettes allow the interviewer to avoid explicitly leading respondents to either recognise or resolve the conflict points; they are masked by the scenarios, allowing respondents to identify and consider the issues independently. By removing any suggestive context that direct questions might add, the respondents will hopefully give more honest answers.

Vignettes also provide a form of 'comfort zone' for respondents. Asking them to comment on a set of facts rather than directly questioning them about their ethical framework 'provides respondents with an opportunity to discuss issues arising from the story from a non-personal and therefore less-threatening perspective'.⁴⁸ This reduces the potential effect of 'social desirability factors';⁴⁹ that is, the urge to provide a response which will cast the respondent in the best light in the context of their work. When asked about a subject directly and in broad terms, a respondent may be tempted to give the socially acceptable or 'correct' answer, which may not be the

⁴⁷ [302], 'Part III: Fundamental Principles', *Bar Standards Board Code of Conduct* (8th Ed.) (2004, Bar Standards Board), <https://www.barstandardsboard.org.uk/regulatory-requirements/the-code-of-conduct/the-code-of-conduct/part-iii-fundamental-principles/>: Last accessed 28/11/2012

⁴⁸ Hughes R., 'Considering the vignette technique' (1998), p.383.

⁴⁹ Wilks T., 'The Use of Vignettes in Qualitative Research into Social Work Values' (2004) 3 (1) *Qualitative Social Work*, p.82.

honest answer. For example, a lawyer who is asked whether they 'fearlessly defend a client' may answer that they do, because that reflects well on them as a professional. Vignettes go deeper. If the lawyer is presented with a specific scenario rather than a loaded question, he or she will be less likely to present a sanitised version of what they *would* do or describe what they *should* do; they are more likely to describe what they *actually* do. Thus, when presented with a vignette, a 'respondent is not as likely to consciously bias his report in the direction of impression management (social approval of the interviewer) as he is when being asked directly'.⁵⁰ In essence, vignettes are a form of research subterfuge, disguising the interviewer's interest in the underlying opinions and attitudes of respondents.

Finally, a danger in qualitative research is the difficulty in analysing and comparing the data collected from respondents. If the questions are broad and non-specific, then 'each respondent will answer in terms of his own mental picture of the task before him'.⁵¹ If questions do not reflect any realistic situation that the respondent can relate to, each answer will reflect a respondent's personal interpretation of a very abstract question. For example, if each respondent is asked 'Do you have a duty of truth-seeking?', the answers given will reflect the meaning each respondent attributes to 'truth-seeking'; it is not a discrete concept. When it comes to analysing whether defence lawyers recognise such a duty, one cannot credibly say that all the respondents understood the concept of 'truth-seeking' in the same way. Therefore, how can one compare their answers? Vignettes go some way to overcoming this troublesome but inevitable complication. By presenting the same, concrete situation to each respondent, 'the survey researcher gains a degree of uniformity and control over the stimulus situation', limiting the potential for more personalised and incomparable responses.⁵² They remove abstraction, forcing respondents to consider limited, definite factors; this should lead to more consistency across an empirical study. Of course, one can never eliminate subjective interpretation, nor would one want to; if the parameters of the question were narrowed too much, then the interviewer would receive the same, mechanical answer over and over again from each respondent. Vignettes provide enough concrete information to enable the comparison of answers, without limiting a respondent's freedom of interpretation too much.

⁵⁰ Alexander, 'The Use of Vignettes' (1978), p.95.

⁵¹ *Ibid.*, p.93.

⁵² *Ibid.*

Although vignettes appear to be effective at eliciting realistic responses to a situation, it is important to remember that they are merely a simulation of life. As Wilks states, '[t]here is no guarantee that the responses to a given vignette will in some way mirror actual behaviour of the respondent in their professional practice.'⁵³ Three key criticisms support this caution. First, vignettes are fixed scenarios, with no human participant other than the respondent.⁵⁴ This problem is well summarized by Hughes:

Individuals are constantly responding to the people and the environment around them and one of the main criticisms levelled at the vignette technique is that it neglects the interaction and feedback that is a necessary part of social life.⁵⁵

This not only adds to the 'unreality' of the vignette, but fails to take account of the potential reactions that others may have to the respondent's analysis of the situation. For example, a vignette cannot take account of the reaction that a defendant, a judge, a prosecutor, a complainant or a police officer may have to the respondent's answers. This may affect how a respondent proceeds. Unfortunately, the vignette technique cannot capture this organic development entirely.

Second, vignettes cannot recreate the effect of a pressurised environment, such as a court room or police station, which might influence the respondent's answers. A respondent is 'right "in the thick of things" in real life, whereas they are always detached or detachable from stories they read'.⁵⁶ However specific the facts of a vignette may be, an interview situation still gives a respondent time and space to think, with no vested interest in the outcome. Third, the problem of 'social desirability bias' cannot be totally eliminated by the use of vignettes. There may be differences between 'what people think should happen and what actually does happen',⁵⁷ indeed, in a study using vignettes, Field suggested that respondents may have still been 'defensively constructing an account for the interviewer built in terms of what they were supposed to be doing rather than what they actually did'.⁵⁸ Cornwell defined this contrast between the response and the reality as public and private accounts.⁵⁹ The

⁵³ Wilks, 'The Use of Vignettes in Qualitative Research' (2004), p.82.

⁵⁴ The interviewer is a human participant in the interview, but not 'within' the scenario. The interviewer is, essentially, an objective observer who is not involved in the scenario in the way a client, a prosecutor or a judge might be. Therefore, the respondent is the only human 'involved' in the vignette.

⁵⁵ Hughes, 'Considering the vignette technique' (1998), p.383.

⁵⁶ Parkinson B., Manstead A., 'Making sense of emotion in stories and social life' (1993 7 *Cognition & Emotion*, p.310.

⁵⁷ Hughes, 'Considering the vignette technique' (1998), p.383.

⁵⁸ Field, 'Early Intervention' (2008), p.182.

⁵⁹ Cornwell J., *Hard-earned lives: Accounts of health and illness from East London* (1984, Tavistock).

former 'reflect what people feel is acceptable to tell strangers',⁶⁰ whilst the latter are 'richer and more detailed descriptions of people's lives.'⁶¹ Literature on the use of the vignette technique also highlights that '[n]o research tool can truly reflect people's real life experiences'⁶² and will only be indicative. Notwithstanding this assertion, when used as a tool for gaining an interpretation of and insight into the real life experiences of respondents, vignettes can 'complement other forms of data collection to provide a more balanced picture of the social world which researchers seek to understand' and 'help unpackage individuals' perceptions, beliefs, and attitudes to a wide range of social issues.'⁶³

3.3 Construction of the vignettes

The construction of the 'Professional Conduct Scenarios' was an extended and challenging process. Discourse on the vignette technique referred to using scenarios that 'seem real and relevant',⁶⁴ and that 'reflect mundane, rather than exceptional, occurrences'.⁶⁵ In constructing vignettes, academics recommended resisting the temptation to describe 'a group of eccentric characters... subject to a chain of disastrous events'.⁶⁶ Capturing the imagination of the respondent should be subordinate to the aim of presenting a realistic situation which reflects his or her real-life experience. Literature suggested that if one aims for the plausible and average, then there is more likely to be a 'close relationship between people's real life and vignette responses',⁶⁷ and avoiding the fantastical should minimise 'an atmosphere of "make believe"'.⁶⁸ One of the research studies reviewed described the use of vignettes that were 'adapted from real cases';⁶⁹ the author adopted a similar method for this study, undertaking several brief periods of shadowing and observation with solicitors, barristers and accredited representatives. On four occasions (April 2008, November 2008, December 2008 and January 2009), the author shadowed criminal defence practitioners as they performed work in court, in the cells, in the police station and in client conferences. Notes based on these experiences were used to draft vignettes for the fieldwork.

⁶⁰ Hughes, 'Considering the vignette technique' (1998), p.384.

⁶¹ *Ibid.*

⁶² *Ibid.*, p.383.

⁶³ *Ibid.*, p.384.

⁶⁴ *Ibid.*, p.385.

⁶⁵ Field, 'Early Intervention' (2008), p.180.

⁶⁶ Finch, 'The Vignette Technique' (1987), p.111.

⁶⁷ Hughes, 'Considering the vignette technique' (1998), p.385.

⁶⁸ *Ibid.*

⁶⁹ Field, 'Early Intervention' (2008), p.180.

None of the final vignettes were direct reproductions of actual ethical conflict situations the author observed. However, all incorporated elements of observed events and everyday, real-life clashes witnessed by the author. Therefore, one might regard the vignettes as a collage of fact-based dilemmas, arranged to represent the conflict points being examined in this thesis. The author constructed a series of brief 'narratives'; this appeared to be the most compact and accessible method, and constituted 'one of the more common applications of the vignette technique', indicating reliability and effectiveness.⁷⁰ The scenarios had to 'contain sufficient context for respondents to have an understanding about the situation being depicted, but be vague enough to "force" participants to provide additional factors which influence their decisions.'⁷¹ Striking this balance was difficult. Too vague a vignette would lead to the issues discussed earlier in this chapter, while too much detail could constrict the necessary flexibility for a respondent to interpret facts and obligations in their own way. A core benefit of the vignette technique is that detailed, fact-based situations can enhance a 'participant's ability to engage with the story'.⁷² However, all of the literature appeared to place considerable emphasis on the philosophy that 'fuzziness is strength'.⁷³ In using vignettes for qualitative, empirical research, academic commentary concurs that 'ambiguity is a positive virtue, since it leaves space for respondents to define the situation in their own terms'.⁷⁴ Ultimately, too much detail results in too much certainty, which in turn eliminates room for conflict. This would defeat the object of the vignettes.

The vignettes outlined basic facts about the subjects of the scenario, the events that had occurred and only *inferred* conflict issues. It was important that the potential conflicts of principle be identified by each respondent if possible. Unnecessary or irrelevant details, such as elements of procedure or unanswerable legal questions, were omitted from the vignettes. In terms of practicality, the literature also highlighted that vignettes should be 'readily understood, [be] internally consistent and not too complex' and 'that more than three changes to a story line was often too confusing for participants to remember'.⁷⁵ Each vignette was approximately a paragraph in length (100-250 words), with one basic storyline made up of four or five events. Where the direction of the story changed, the vignette was divided into two separate

⁷⁰ Hughes, 'Considering the vignette technique' (1998), p.382.

⁷¹ Barter C., Renold E., 'The Use of Vignettes in Qualitative Research' (1999) 25 *Social Research Update*, 4.

⁷² Ibid.

⁷³ Finch, 'The Vignette Technique' (1987), p.112.

⁷⁴ Ibid.

⁷⁵ Barter, 'The Use of Vignettes' (1999), p.4.

parts; 'Part A' would be presented and discussed, followed by 'Part B'. The vignettes were also drafted to reflect, as was highlighted earlier, 'mundane, rather than exceptional, occurrences'.⁷⁶ The events described involved an alleged offence followed by interaction with the client, court, police and others.

3.4 Target Respondents

The only variable that the empirical study took account of was the *type* of criminal defence lawyer. 'Criminal defence lawyer' is an umbrella term and in the course of the fieldwork, three types of criminal defence lawyer were interviewed - Solicitors, Barristers and Accredited Police Station Representatives. At the early stages of the fieldwork, the author's intention was to interview approximately 20 criminal defence lawyers from at least four firms of solicitors and one set of chambers. The process of securing interviews with the respondents was extended and problematic. As stated earlier, several periods of observation were undertaken with firms and chambers in the year leading up to the fieldwork; these were used to establish key contacts within the organisations, disseminate information about the study amongst practitioners and to develop relationships with individual practitioners who seemed open to the idea of participation. Interviews were organised through two channels. The first, and primary method, was to directly contact individual respondents who were considered willing to be involved, either by telephone, by email or in person (either at court or at their organisation). The second method was to arrange interviews by proxy, either through a respondent who had already been interviewed and who recommended another practitioner, or through staff at the organisations targeted (such as clerks at barristers' chambers), who would arrange an interview on the author's behalf.

The period of fieldwork began in March 2009. Initially, the primary method of securing interviews through personal contact resulted in only five interviews by the end of April 2009 (four solicitors and one accredited representative, at only three firms). This lack of success led to the second method, what one might call 'exploiting' contacts. This was, frankly, a result of luck rather than planning, as two respondents offered to contact others for me. This saw a greater success rate by the beginning of June 2009 – ten interviews with seven solicitors, one barrister and two accredited representatives, at four firms and one chambers. However, the period of fieldwork had now extended beyond the original schedule of two months; therefore, a more persistent approach was adopted, communicating with potential respondents nearly

⁷⁶ Field, 'Early Intervention' (2008), p.180.

every day and informing them that the interviews needed to be completed by the end of June 2009. This injection of urgency resulted in six more interviews. In total, 16 respondents from all three of the 'categories' of defence lawyer identified above were interviewed – nine solicitors, four barristers and three accredited representatives. These were drawn from six firms and two sets of chambers.

The key problems encountered were making initial contact with respondents and convincing them to commit to an interview. At least 25 criminal defence lawyers were approached for interviews, either through speculative messages or direct conversation. However, several either promised to commit and never did, or did not respond at all.⁷⁷ Unsurprisingly, more success resulted where either an established relationship with a respondent existed or an established contact arranged an interview on the author's behalf. It should also be noted that only four of the respondents were what one might term 'leaders' at their organisations; that is, those involved in management, such as partners at firms. This is not to say that other respondents were not experienced or senior; however, it would have been desirable to interview more organisation leaders, not only due to the considerable experience they would inevitably have, but because of the potentially high-end work they do. The reasons for the absence of more leaders and the general limited numbers of willing respondents are difficult to identify; without doubt, the time demands on criminal defence lawyers contributed. Some of the obstacles discussed earlier, such as distrust of independent researchers, may have played a part, but one can only speculate.

The empirical study was based exclusively in a single, major legal circuit in England and Wales and the respondents were drawn from organisations practising primarily on that circuit. There are, of course, limitations to conducting research in a single location with a low number of subjects, namely the potential for localised cultures and the lack of breadth across the profession as a whole. However, this study represented an insight rather than a statistically valid assessment. A single-area study can provide valuable indicative data if, for example, it 'reflect(s) geographical

⁷⁷ Clearly, some things never change. In Danet, 'Obstacles to the study of lawyer-client interaction: The biography of a failure' (1979-1980), the authors detail an aborted study into lawyer-client relations in the United States due to a lack of respondents. At one point, the authors describe that they secured the 'commitment in writing of two attorneys to participate in the study. Only later did we come to understand how little such written commitment meant, when it came to the test.'

spread within a single police force area'⁷⁸ and targets respondents with 'a range of experience'.⁷⁹ This piece of fieldwork attempted to capture this.

4 The Final 'Professional Conduct Scenarios'

The four final scenarios were presented (minus the 'titles') to the respondents:

4.1 Scenario A

Your client, Z, has been charged with possession of heroin with intent to supply. He was arrested on North Road, which is a well-known haunt for drug users. Z claims that the heroin found on him was for personal use and that he does not deal. He pleads not guilty and his trial date is set; however, in your last meeting with Z before the trial, he says that he won't be able to attend the first day of the trial as he 'needs to score on North Road after the weekend.' You warn him he must attend the trial; he responds by asking you to explain his absence to the court. You outline the potential consequences of failing to attend, but he insists on his instructions. On the morning of the trial, Z does not appear as expected; you attempt to phone him but receive no answer. You must explain Z's absence to the court.

In this vignette, the respondent is provided with information by the client; this information could potentially aid the court in locating the defendant and thereby facilitate the proceedings and progress the truth-seeking process. Equally, the information could be disadvantageous to the client. It not only casts him in a bad light but could help the court find and convict him. The respondent therefore needs to reconcile competing duties - to keep communications with the client confidential and to assist the court in the administration of justice and pursuit of the truth.

4.2 Scenario B

Your client, A, has been charged with raping B. A met B in 'The Dock', a local nightclub, and after having drunk a lot, went back to B's house. B claimed that A then raped her when she refused to have sex with him. A denies the allegation, claiming that B consented at the time and had made it clear she wanted to have sex throughout the night. There were no witnesses to the alleged rape itself. A claims to have seen B in 'The Dock' several times before, behaving flirtatiously and always leaving with different men. He claims others would agree with him that B has a reputation for picking up men in 'The Dock' and taking them home to have sex. She has alleged rape against a man in the past, a charge which was dropped due to lack of evidence. A has an historic conviction for sexual assault and witnesses attest to his history of sexual promiscuity. A instructs you to argue that B is lying and that her sexual history backs up this claim.

⁷⁸ Field, 'Early Intervention' (2008), p.180.

⁷⁹ Ibid.

In this scenario, the respondent is presented with a conflict between the duty to advance the best interests of the client and the duty to act in a fair and ethical manner. On the one hand, exploring the sexual history of the complainant may demonstrate a propensity to make false claims and may suggest to a jury that she is someone who consents to random sexual encounters regularly. This may further the client's case that she is lying about the alleged rape. However, pursuing this line of questioning may be a cheap and immoral tool for humiliating someone who may be a vulnerable victim of a serious sexual attack, to the advantage of a man with a record of sexual offences.

4.3 Scenario C

PART A: W, a 40 year old male, has been charged with sexually assaulting his 13 year old daughter, X, whilst visiting her at her mother's home. Her mother, Y, had left the house briefly to go to the shop. W has a string of past convictions for domestic violence directed at Y, for which he has spent time in custody and which led to their separation. 'W' also had a charge of indecent exposure to a minor dropped due to a lack of evidence. He protests his innocence, claiming his daughter is lying and made the accusations after he refused to give her money. W requests your representation in what will clearly be a large-scale and potentially lucrative Crown Court trial.

PART B: W pleads not guilty, on your advice. In preparing for trial, you discover that X has raised allegations of violence against both of her parents in the past, none of them pursued by the Police. The trial begins and the prosecution call X, who has been given special measures to protect her in court. She claims that W asked her to perform a sexual act on him and attacked her when she refused. She also claims that he has sexually abused her several times in the past, but she was too scared to tell anyone. You begin cross-examination of X.

The conflict in this scenario pitches detachment against fairness. Defending a man with a history of domestic violence and sexual deviance with minors could be considered abhorrent and not a task that a figure with a duty of fairness should undertake. In addition, attacking a child for the purpose of advancing his case could also be considered unethical. However, if the respondent also has a duty to remain detached and not pre-judge a client based on their character or the nature of the case, then a conflict exists.

4.4 Scenario D

PART A: Your client, F, has been charged with driving whilst under the influence of alcohol. She was pulled over by a Police Officer who breathalysed and arrested her. She provided a breath sample using an Intoximeter at the Police Station, which gave a reading of 50 microgrammes – 15 microgrammes over the limit. This entitled her to choose to replace her

breath sample with a blood or urine sample. However, contrary to procedure, an officer said that she must give a blood or urine sample, and she complied. Her samples confirmed she was over the limit and she was charged. She tells you she 'was at the pub but didn't drink anything' and on her instructions, you enter a plea of not guilty.

PART B: The trial begins. The arresting officer gives evidence that on arrest F claimed she'd 'only had one drink'. In a brief break, F admits to you that she may have drunk alcohol at the pub but had just forgotten. In addition to this, the officer who operated the Intoximeter fails to confirm that it was working reliably, as is required. The prosecution case is drawing to a close.

This scenario presents respondents with a difficult clash of principles. The client appears to have committed the offence but wishes to plead not guilty on a 'technicality'. The respondent must therefore resolve the conflict between the duty to be a partisan for the client, and the duties to seek the truth and aid the administration of justice. The latter obligations require the lawyer to aid the conviction of the guilty and share information with the court, including being open about tactics and mistakes by the police and prosecution. The vignette therefore requires difficult decisions about what duties will take precedence. It is important to point out that none of the vignettes contain a direct reference to the theoretical principles of the 'zealous advocate' model, nor explicitly outline a conflict; they set up a series of facts and are left open to the interpretation of the respondent. This, as has previously been stated, is to ensure that a respondent identifies any duties or conflicts without guidance.

Conclusion

The design of the methodology for this empirical study was driven by a genuine desire to connect with the everyday life of the practising criminal defence lawyer. At every stage of the process, the approach adopted was consciously questioned to ascertain whether it would lead to a more open, more honest and more natural exchange between the researcher and the respondents. From the beginning, the author was aware of the undoubted possibility that the criminal defence lawyers interviewed might be either unresponsive or try to satisfy outsider curiosity with easy answers; this would, of course, be of little value. Encouragingly, every person interviewed happily engaged and expressed interesting and insightful ideas. Ensuring that the methodology was rigorous and robust had two key benefits. The first, and most obvious, was referred to at the beginning of this article: to give the study credibility. A well-designed methodology leads, in theory, to more valid results. The second benefit was practical; if one sees the researcher as an explorer, then he or she must be well equipped. With a strong and thoroughly researched framework

for the study, a researcher can feel confident and freed to effectively interview the respondents. At no point did the author feel under-prepared or out of his depth, and this was in large part due to the methodology used.